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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. 562

C. K. YOON, *Petitioner,*

vs.

TERRITORY OF HAWAII, *Respondent.*

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, C. K. Yoon, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered August 3, 1945, affirming

the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW.

No opinion was rendered by the Circuit Court of Appeals. (R. 208.) The opinion of the Supreme Court of the Territory of Hawaii is contained in the record. (R. 22-29.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was convicted of the crime of embezzlement in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, and sentenced to imprisonment for one year. (R. 201-203.) The conviction rested on an information charging him in terms with embezzling "a check of the value of $25.00 (Twenty-five Dollars), the property of Frank Silva". (R. 2-3.) A demurrer thereto was interposed and overruled. (R. 9-10, 24.) A bill of particulars was subsequently furnished. (R. 10-11, 26, 208.) Petitioner prosecuted a writ of error to the Supreme Court of the Territory of Hawaii, and the judgment was affirmed. (R. 30.) On this writ of error the overruling of the demurrer was assigned as error. (R. 24.) The Supreme Court of Hawaii said in its opinion:

> "However, we deem it proper to point out that we have not overlooked the fact that the Territory did not identify the check by describing it in the information as to form and contents, thus not properly informing the defendant as to the nature

and cause of the accusation, nor fully protecting him against future jeopardy for the same offense. (See Const. U.S., 6th and 5th Ams.) The record does not disclose that this defect of pleading was made the subject of an exception, nor is it raised by any assignment of error. It is therefore deemed to have been waived." (R. 25-26.)

As the Constitution of the United States was involved, petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit (R. 34-35) in accordance with section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.) The judgment was there affirmed without opinion. (R. 208-209.)

JURISDICTION.

Jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. (28 U.S.C.A., sec. 347.)

QUESTIONS PRESENTED.

(1) Has petitioner been denied due process of law by the decision of the Supreme Court of the Territory of Hawaii?

(2) Has petitioner been denied due process of law by the decision of the Circuit Court of Appeals for the Ninth Circuit?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court and with its own decisions.

The Supreme Court of Hawaii decided that the information against petitioner violated his rights under the 5th and 6th Amendments to the Constitution. (R. 25-26.) The applicability of those amendments to civil and criminal cases in the Territory of Hawaii, cannot be doubted. (*Farrington v. T. Tokushige,* 273 U. S. 299, 47 S. Ct. 406, 409, 71 L. Ed. 646; *Lovato v. New Mexico,* 242 U. S. 199, 37 S. Ct. 107, 108, 61 L. Ed. 244; *Callan v. Wilson,* 127 U. S. 556, 8 S. Ct. 1301, 32 L. Ed. 223.) But the Supreme Court of Hawaii did not protect and enforce the constitutional rights of petitioner or grant relief because of their violation. It noticed plain and serious error affecting the constitutional rights of petitioner, but deemed that petitioner had waived such rights through failure to comply with territorial procedure in the matter of exceptions and assignments of error. In turn, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment without opinion.

This court has admonished all courts to be ever watchful of the constitutional rights of citizens and to guard against stealthy encroachments thereon. (*Byars v. United States,* 273 U. S. 28, 32, 47 S. Ct. 248, 249, 71 L. Ed. 523.)

In *Simons v. United States,* 119 F. 2d 539, the Circuit Court of Appeals for the Ninth Circuit said, at page 544:

"Defendant urges, however, that he has not been accorded due process. As we have said above, the jurisdiction of the Court to try the case is subject to the controlling provisions of the Constitution. The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property, without due process of law. *We take it that any waiver of the defendant would be inffectual if it went so far as to deny him due process of law.*

Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, *accusation in due form,* notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty'. See 16 C. J. S., Constitutional Law, sec. 579, p. 1171, and cases cited." (Emphasis added.)

In *Foster v. United States,* 253 F. 481, the same court also said, at pages 482 to 484:

(482) "We are of the opinion that the indictment is fatally defective and that the demurrer should have been sustained. The plaintiffs in error had the constitutional right to be informed of the nature and cause of the accusation against them. * * * (483) The bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in (484) its discretion where the indictment, while so expressed as to be good on demurrer, still does not furnish the defendant all the information he is entitled to have before being compelled to go to trial. It does not constitute a part of the record, and is not subject to demurrer."

And where constitutional rights are involved, the approved rule is that plain and serious error will be noticed and justice administered despite the absence of exception or assignment. (*Mahler v. Eby*, 264 U. S. 32, 45, 44 S. Ct. 283, 288, 68 L. Ed. 549.)

The decision in the present case cannot be reconciled with the foregoing cases. When the Supreme Court of Hawaii determined that petitioner's constitutional rights had been violated in the trial court, its duty was plain. It should have protected and enforced those rights and granted relief from the violation thereof. It did not do so. On the contrary, its decision merely reflects another violation of due process of law. And the same is equally true of the decision of the Circuit Court of Appeals.

(2) The decision of the Circuit Court of Appeals is untenable and should not be permitted to stand as precedent.

The unmistakable effect of the decision of the Circuit Court of Appeals is to permit the mandates of the 5th and 6th Amendments to the Constitution to be overridden by procedural requirements of territorial courts. Because the territorial court on procedural grounds denied petitioner relief from a conviction based on an information which the territorial court held violative of his constitutional rights, the circuit court of appeals in turn, and for the same reasons, denied petitioner relief. Because the territorial court refused to consider plain and serious error depriving petitioner of his constitutional rights, the circuit court of appeals in turn refused to consider such plain and serious error. In effect, moreover, the right of peti-

tioner to appeal to the circuit court of appeals from the judgment of the territorial court in a case where the Constitution of the United States was involved (Judicial Code, sec. 128, 28 U.S.C.A., sec. 225), was abrogated or seriously impaired. Neither territorial nor circuit court of appeals was watchful of the constitutional rights of petitioner. Neither territorial nor circuit court of appeals guarded against encroachments thereon. Therefore, the decision of the Circuit Court of Appeals for the Ninth Circuit is untenable and should not be permitted to stand as precedent.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court in said cause be reviewed and reversed.

Dated, San Francisco, California,
October 17, 1945.

O. P. SOARES,
Counsel for Petitioner.

HERBERT CHAMBERLIN,
Of Counsel.